The Broyhill Company *and* District No. 162, International Association of Machinists and Aerospace Workers, AFL-CIO. Case 17-CA-9581

March 31, 1982

DECISION AND ORDER

On February 13, 1981, Administrative Law Judge Leonard N. Cohen issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order. However, in light of our colleagues' dissent, we find it appropriate to set forth our reasons for adopting the Administrative Law Judge's conclusions that Respondent effectively disavowed the unlawful conduct of Supervisor Junker and that further remedial action is not warranted herein.

On several occasions during the month of April 1980[2] Supervisor Junker made statements to certain employees in the fabrication department which were violative of Section 8(a)(1) of the National Labor Relations Act, as amended. Neither the charge filed on April 14 nor the amended charge filed on May 1 made reference to these statements. It does not appear that Respondent learned of Junker's conduct until May 5, when the Board agent conducting the investigation met with officials of Respondent and its attorney.

The next day, Respondent posted on its bulletin board a "NOTICE TO ALL EMPLOYEES," which is set forth in full in the Administrative Law Judge's Decision. In the notice, Respondent referred to the pending Board investigation and expressed its regret that improper conduct may have occurred. By use of the "we will not" language that is traditionally employed in Board notices, Respondent's notice specifically disavowed statements made by Junker that were violative of the Act. The notice even included the analogue of the so-called broad order. Thus, it stated that Respondent would not "in any other manner" interfere with its employees' Section 7 rights, and it affirmatively set forth for the employees exactly what those rights were. The notice was signed by Respondent's plant manager.

Applying the standards set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), the Administrative Law Judge concluded, and we agree, that the May 6 notice to employees effectively disavowed Junker's unlawful statements and obviated the need for additional remedial action. Thus, the Administrative Law Judge emphasized that the notice was posted immediately after Respondent learned of Junker's conduct; that "Respondent's notice specifically [and], in statutory language, assures its employees that it will not engage in the type of conduct of which it had been accused or engage in any other types of unlawful conduct"; that "the employees working under Junker's supervision, as well as all other production employees, had an adequate opportunity to read the notice if they so chose"; and that "Respondent did not in any other manner violate the Act."

Our dissenting colleagues would reverse the Administrative Law Judge, and find that Respondent's notice did not adequately repudiate the unlawful conduct. In reaching this conclusion, they apply the *Passavant* criteria in a highly technical and mechanical manner. First, the dissenters claim that the notice was not timely because it was posted 5 weeks after the first unfair labor practice. However, they do not dispute that Respondent acted in good faith and lacked knowledge of Junker's conduct prior to May 5. In this connection, it must be remembered that in litigated cases Board notices are never posted within 5 weeks of the commission of the unfair labor practice. In the instant case, Respondent would be ordered to post our colleagues' notice well over a year after the conduct in issue.

Second, our dissenting colleagues disagree with the Administrative Law Judge's conclusion that there had been adequate publication of the notice, even though they acknowledge that it was posted on the company bulletin board and that three employees testified that they had seen it. The dissent implies that other employees may not have had an opportunity to see the notice, but this is pure speculation.

Finally, the dissent claims that the notice was not "sufficiently specific" because it "does not name Junker or mention the circumstances under which Junker made the unlawful statements." However, it should be noted that Board notices do not contain this kind of specificity. Indeed, it is anomalous that our colleagues, after faulting Respondent's notice on these grounds, would provide as their remedy that Respondent shall post another notice disavowing the unlawful conduct in terms

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] All dates hereinafter are in 1980 unless otherwise noted.

virtually identical to those appearing in the notice Respondent has already posted.

In sum, the conclusion is inescapable that Respondent did all that it reasonably could do to disavow the unlawful conduct of its supervisor. Such voluntary action by employers should be encouraged by this Board. Accordingly, we adopt the Administrative Law Judge's conclusion that Respondent's notice adequately repudiated Respondent's unlawful conduct.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

MEMBERS FANNING AND JENKINS, dissenting in part:

We disagree with our colleagues' decision insofar as it adopts the Administrative Law Judge's conclusion that Respondent effectively disavowed the unlawful conduct of its supervisor, Junker. For the reasons set forth below, we would reverse the Administrative Law Judge with regard to Respondent's attempted disavowal and would order appropriate remedial action.

The complaint alleges and the Administrative Law Judge found that in April 1980[3] Willis Junker, supervisor in Respondent's fabrication department, made a series of unlawful remarks to employees within his department. These remarks, as more fully set forth by the Administrative Law Judge, consisted of Junker's telling one employee that "the old man would probably shut the doors" if the Union came in, and telling another employee that Respondent was "cracking down on absences" because of the advent of union activity and that Respondent's owner would close the plant if the Union came in. Additionally, Junker told an employee to keep him informed about the employees' union activity and questioned another employee about his attendance at union meetings and the prospects of the Union's coming in. The Administrative Law Judge concluded that Junker's statements violated Section 8(a)(1) of the Act, but no remedial action was warranted because Respondent effectively disavowed Junker's unlawful conduct. We disagree with the conclusion that no further remedial action is warranted here.

On May 6, Respondent posted the following notice on a bulletin board:

[3] All dates hereinafter are in 1980.

NOTICE TO ALL EMPLOYEES

On April 14, 1980, District No. 162, International Association of Machinists and Aerospace Workers, AFL-CIO filed an unfair labor practice charge against us with the National Labor Relations Board. The Seventeenth Regional Office of the National Labor Relations Board is in the process of investigating the unfair labor practice charge.

We have made an investigation of the unfair labor practice charge allegations and have concluded that a supervisor of the company may have acted in an improper manner. We regret this and we want each of you to know that the National Labor Relations Act gives all employees the following rights: to organize themselves, to form, join, or support unions, to bargain as a group through a representative they choose, to act together for collective bargaining or other mutual aid or protection.

We will not request that any employees keep us informed about what is going on insofar as the Union is concerned and we will not in any way interrogate employees about their union activities and whether they went to union meetings or the activities of other employees. Further, we will not interrogate employees as to whether the union will come in.

We will not threaten to close the plant if the union succeeded in organizing the employees. We will not in any other manner interfere with or coerce employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above named union, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities. All of our employees are free to become, remain, or refrain from becoming or remaining members of any labor organization.

THE BROYHILL COMPANY
By */s/ Robert E. Tongish*
Robert E. Tongish
Plant Manager
May 6, 1980

The Administrative Law Judge concluded that this notice effectively repudiated Respondent's unlawful conduct. In so doing, the Administrative Law Judge correctly set forth the standards for effective repudiation contained in *Passavant Memorial*

Area Hospital, 237 NLRB 138 (1978). As stated therein, to be effective such repudiation must be timely, unambiguous, specific in nature as regards the coercive conduct, and free from other proscribed conduct. Additionally, there must be adequate publication of the repudiation and it must contain assurances that such conduct will not recur in the future. While we agree with the Administrative Law Judge's enunciation of Board standards for effective repudiation, we do not agree with his application of these standards to the facts of this case. In this regard, we would find that, although Respondent's notice to its employees accords with these standards in some respects, in other significant respects it does not meet them.

We note first that Respondent's notice was not posted until the Board was in the process of investigating the instant charge, fully 5 weeks after the first threat of plant closure. The Administrative Law Judge implied that this delay in posting is of no significance because Respondent may not have been aware of the unlawful remarks of Supervisor Junker until the Board agent investigating the case met with Respondent's officials. However, it is axiomatic that the possibility that an employer may not have authorized or known of its agent's unlawful acts does not free it from responsibility for that agent's action.[4] Thus, while the apparent lack of prior knowledge of the unlawful conduct in the upper echelons of Respondent's management may indicate Respondent's good faith in posting the notice, it should have no bearing on our inquiry into the effectiveness of Respondent's attempted disavowal of the unlawful conduct. In our view, the 5-week delay between the first threat of plant closure and Respondent's posting of the notice is sufficient to prevent the attempted disavowal from effectively dissipating the severe impact of Respondent's threat to close the plant.

Further, although the Administrative Law Judge states, and the majority apparently agrees, that it is "abundantly clear that the employees working under Junker's supervision, as well as all other production employees, had an adequate opportunity to read the notice if they so chose," there is no indication in the record of the location of the bulletin board on which the notice was posted, or the duration of the posting. Only 5 of the approximately 50 unit employees were called upon to testify. Of these, just three stated that they had seen the notice, but no evidence was presented with regard to the likelihood that other employees would have seen it. Additionally, there is no evidence that Respondent made any other effort to communicate its disavowal to the employees in the fabrication department who were supervised by Junker and who worked with the employees whom he threatened and interrogated. Thus, although our colleagues chide us for speculating about this aspect of the case, it is they who engage in speculation at the risk of employee rights protected by the Act.

Finally, Respondent's notice is not sufficiently specific. In this regard, the notice does not name Junker or mention the circumstances under which Junker made the unlawful statements. It merely states that a supervisor "*may* have acted in an improper manner." (Emphasis supplied.) This deficiency is particularly significant with respect to the threats of plant closure. As the Board stated in *El Rancho Market*:[5]

> This Board has long recognized that . . . threats of job loss and of closing if employees select union representation are among the most serious and flagrant forms of interference with employees' Section 7 rights. [*Irving N. Rothkin d/b/a Irv's Market*, 179 NLRB 832 (1969); *General Stencils, Inc.*, 195 NLRB 1109 (1972).] And the Supreme Court has expressed its view that such threats are among the less remediable unfair labor practices. [*N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 611 (1969).] For, when all is said and done, the specter of job loss and of closing once conjured up is not easily interred.

Thus, we conclude that Respondent's promise, contained in the posted notice, not to "threaten" to close the plant was not sufficient to erase the coercive effect of Junker's earlier statements to the effect that Respondent would close the plant if the Union succeeded in organizing the employees.[6]

In view of all the foregoing, we conclude that Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union activities and by threatening employees with reprisals and with plant closure if the Union succeeded in organizing Respondent's employees. Moreover, since we conclude that Respondent has not effectively repudiated its unlawful conduct, we would order it

[4] See, e.g., *Jays Foods, Inc., and Nielsen Brothers Cartage Co., Inc.* v. *N.L.R.B.*, 573 F.2d 438 (7th Cir. 1978), enfg. in relevant part *Jays Foods, Inc.*, 228 NLRB 423 (1977).

[5] *El Rancho Market*, 235 NLRB 468, 476 (1978).

[6] The majority asserts that Respondent's notice was as efficacious as would be one provided for by the Board, particularly as to timeliness and content. They fail, however, to consider an important difference. The Board's notice states, under the Board's seal, that it is posted by order of an agency of the United States Government because the Respondent's conduct has been found by the Government to contravene Federal law, and that Respondent's compliance with our order is to be monitored by the Government. Additionally, the Board's notice must remain posted for 60 days. Clearly, these factors enhance the relative effectiveness of the Board's notice in mitigating the impact of Respondent's coercive conduct.

to cease and desist from such conduct, and to post an appropriate official Board notice for the usual 60 days.

DECISION

STATEMENT OF THE CASE

LEONARD N. COHEN, Administrative Law Judge: This matter was heard before me in Dakota City, Nebraska, on August 23, 1980.[1] On May 22, the Regional Director for Region 17 of the National Labor Relations Board issued a complaint and notice of hearing based on an unfair labor practice charge filed on April 14 and amended on May 1 alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act).

Issues

1. Whether The Broyhill Company (herein called Respondent) through its supervisor and agent, Willis Junker, committed various independent violations of Section 8(a)(1) of the Act during the month of April and, if so, whether a remedial order is required.

2. Whether Respondent violated Section 8(a)(3) and (1) of the Act when it discharged employee Bill Bennett on or about April 4.

3. Whether Respondent violated Section 8(a)(3) and (1) of the Act by laying off its employee Gary Custer on or about April 11.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Counsel for the General Counsel and Respondent filed briefs which have been carefully considered.

Upon the entire record of the case and from my observation of the witensses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that at all times material herein it has been a Nebraska corporation with an office and principal place of business in Dakota City, Nebraska, where it is engaged in the manufacture and distribution of agricultural, industrial, and turf equipment. During the last 12 months, Respondent purchased and received goods and services valued in excess of $50,000 directly from suppliers located outside the State of Nebraska. Accordingly, I find that at all times material herein Respondent has been an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that District No. 162, International Association of Machinists and Aerospace Workers, AFL-CIO (herein called the Union), is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*[2]

1. Background

Respondent employs overall approximately 50 production and maintenance employees with 13 to 15 of these employed as machine operators in the fabrication department. Although Willis Junker supervised the day-to-day operation of the fabrication department at all times relevant herein, all decisions regarding hirings and terminations, with rare exceptions, were made by Robert Tongish, plant manager.

Bill L. Bennett was hired by Respondent in mid-October 1979 as a machine operator and he remained so employed until his discharge on April 4. On July 26, Bennett, on the advice of Respondent's counsel, was rehired.

Gary D. Custer was hired on January 28 as a lathe and boring mill operator in the fabrication department and remained employed until laid off on April 11. Like Bennett, Custer was recalled to work in mid-July.

2. Union activity

At some point during the last week in March, Bennett approached Custer and inquired whether the latter thought it would be advisable for the employees to organize. Custer responded that he did and asked Bennett if Bennett wanted him to contact the Union. Bennett agreed and Custer in turn contacted a business representative of the Union. On or about March 26, a meeting for Respondent's employees was held at the union hall. Bennett and Custer, along with approximately eight other employees, attended. The union representative explained the general organizing process and urged the employees to sign authorization cards and secure the signatures of their coworkers.

Within the next week or two, Bennett and Custer each solicited, while at work on breaktime, the signatures of approximately 10 employees. However, neither Bennett nor Custer was alone in this activity and at least three other employees were similarly actively engaged in soliciting signatures on union authorization cards. Almost immediately following the union meeting of March 26, Bennett and Custer, as well as approximately 15 other employees, commenced wearing various paraphernalia on their clothing, which clearly indicated their support of the Union. These included buttons, stickers, union jackets, and plastic pencil pouches or holders. By the time the Union held its second meeting on April 5, nearly all of Respondent's employees had signed union authorization cards.[3]

[1] Unless otherwise stated, all dates occurred in 1980.

[2] Except wherein specifically noted, the material facts are not in dispute.

[3] A petition seeking an election among Respondent's production and maintenance employees was filed by the Union on April 14 in Case 17-RC-9021. Pursuant to a Stipulation for Certification upon Consent Election, an election was conducted on June 19 with 16 votes being cast for the Union and 21 votes cast against. No objections were filed and the results were certified on June 27.

Respondent's plant manager, Tongish, admitted that he became aware of the union activity in late March but denied knowing that either Bennett or Custer were two of the Union's leading adherents prior to their discharge and/or layoff. Apart from one conversation between Custer and Junker, set forth below, which took place after Tongish had already reached the decision to lay Custer off, the only evidence offered to show that any official of Respondent was aware of Bennett's and Custer's activities in securing other employees' signatures was the testimony of employee and fellow union activist Robert Moon. According to Moon's undenied account, shortly after the first union meeting, he observed, on one occasion, Frank Baird, a supervisor in another department, standing approximately 5 feet behind Bennett and Custer in the lunchroom while the two were signing up an unidentified employee. Moon did not testify how long Baird remained watching the pair.[4]

3. The alleged 8(a)(1) conduct

The General Counsel, through various witnesses, introduced evidence that, on several occasions between April 1 and late April, Supervisor Junker made remarks to certain fabrication employees that constitute both independent 8(a)(1) violations, as well as evidence of general union animus on the part of Respondent. Junker, who himself was discharged in early May, did not testify.

Incident No. 1: On or about April 1, according to the testimony of fabrication employee Leslie Bennett,[5] the brother of alleged discriminatee Bill Bennett, he went into Junker's office to discuss a blueprint. During their discussion, the subject of the Union was somehow brought up and Bennett stated that he hoped that it would come in. Junker replied that if it did "the old man would probably shut the doors."

Incident No. 2: On either the day before or the actual day itself that Custer was informed that he would be laid off, Leslie Bennett and Custer were in Junker's office when one of the two asked Junker if the rumors that Custer was to be laid off were true. When Junker answered, "[N]o," that he had not heard of it, Custer stated that he was afraid for his job since he was one of the main people distributing cards and talking to employees. Junker responded that he wanted Custer to keep him informed about the Union and what was going on.[6]

Incident No. 3: On the morning of April 23, employee Moon received a warning from Junker for absenteeism. Later that same day, Moon went to Junker's office and spoke to him in private about the warning. According to Moon's account, Junker stated that the reason the Company was cracking down on absenteeism was because the employees were trying to get the Union in and that the employees were bringing problems among themselves. Junker added that, if the Union came in, Broyhill, the owner, would close the plant. Junker further stated that Broyhill had enough money to live on and that he could make it by simply cutting back from eight to four Cadillacs.

Incident No. 4: Sometime during the latter portion of April, Leslie Bennett and Junker had a conversation in the welding area. According to Leslie Bennett, Junker stated that he had heard from Custer that Custer had obtained a better job and that Junker had actually done him a favor by laying him off. Junker then asked Leslie Bennett if he (Bennett) had attended any union meetings and if he thought the Union was going to come in. Bennett answered "[N]o" and that ended the conversation.

On May 6, during the investigation of the instant charge, Respondent posted on its bulletin board the following notice:

NOTICE TO ALL EMPLOYEES

On April 14, 1980, District No. 162, International Association of Machinists and Aerospace Workers, AFL-CIO filed an unfair labor practice charge against us with the National Labor Relations Board. The Seventeenth Regional Office of the National Labor Relations Board is in the process of investigating the unfair labor practice charge.

We have made an investigation of the unfair labor practice charge allegations and have concluded that a supervisor of the company may have acted in an improper manner. We regret this and we want each of you to know that the National Labor Relations Act gives all employees the following rights: to organize themselves, to form, join, or support unions, to bargain as a group through a representative they choose, to act together for collective bargaining or other mutual aid or protection.

We will not request that any employees keep us informed about what is going on insofar as the Union is concerned and we will not in any way interrogate employees about their union activities and whether they went to union meetings or the activities of other employees. Further, we will not interrogate employees as to whether the union will come in.

We will not threaten to close the plant if the union succeeded in organizing the employees. We will not in any other manner interfere with or coerce employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above named union, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or

[4] Both Bennett and Custer, as well as others, testified that they observed Junker observing them while they were soliciting signatures on several occasions from a window in his office some 20 to 25 feet away. In view of the distance involved, as well as Junker's inability on any of these occasions to hear their discussions, this testimony is not probative on the question of Respondent's specific knowledge. Additionally, Bennett and Custer each testified that during the same time period they carried union authorization cards in their front pockets. The evidence establishes that at the most only the top one-third of the card was visible. Although during this time both Bennett and Custer had many face-to-face conversations with Supervisor Junker, no mention was ever made to them regarding the cards.

[5] Leslie Bennett worked from February 1980 until sometime in July when he voluntarily left Respondent's employ.

[6] The above account is based on a synthesis of the somewhat confusing testimony of Leslie Bennett and Custer regarding this incident.

other mutual aid or protection, or to refrain from any and all such activities. All of our employees are free to become, remain, or refrain from becoming or remaining members of any labor organization.

THE BROYHILL COMPANY
By /s/ Robert E. Tongish
Robert E. Tongish
Plant Manager
May 6, 1980

4. Bill Bennett's work history

Bennett first worked for Respondent in 1974 and on that occasion he either quit or was discharged after approximately 30 days for failing to return to work. In October 1979, Bennett was working for approximately 2 weeks at Respondent's facility as an employee of Manpower, a supplier of temporary employees. On October 15, while Tongish was out of town, Junker, without the knowledge or approval of Tongish, hired Bennett as a full-time machine operator.

Bennett testified that, in mid-January, he received his first warning from Junker. On that occasion, Junker informed him that, if he continued to waste time by wandering around the building and conversing with other employees, he would be subject to discharge.

In mid-February, Junker spoke to Tongish about his continuing problem with Bennett's wandering away from his work area. Junker informed Tongish that he was transferring Bennett to the "marval" saw which he hoped would reduce Bennett's continuing problem.[7] At the time Junker made this assignment, he informed Bennett that he was giving him his last opportunity.

Sometime around March 20, before the employees even began discussing the Union, Bennett asked Junker for a raise. Junker said no, that Bennett's work was not good enough.

Bennett testified that, "shortly" before he was terminated, his car broke down and he asked Junker for an hour off. Junker gave him the hour off but informed him that any further absences would result in his termination. Bennett further testified that he was neither absent nor tardy after he received this "final" warning.

Attendance records were introduced into evidence that indicate that Bennett was absent for part of the day on both Monday, March 31, as well as on Wednesday, April 2. Bennett was totally unable to recall a second absence during the week of March 31 to April 4. Tongish credibly testified that after the second absence he reviewed Bennett's personnel file on either April 2 or April 3 and, at that time, instructed Junker to discharge Bennett on April 4.

On Friday afternoon, April 4, Junker called Bennett into his office and informed him that Tongish had decided to terminate him for wasting too much time and for a bad absentee record.

The attendance records indicate that from January 1 through April 1 Bennett was tardy once, sick once, and had 19 "excused absences."[8] A review of the attendance records for all production and maintenance employees indicates that, during the first 3 months of 1980, Bennett had by far the worst attendance record.

5. Gary Custer's work history

Custer was hired to operate the lathe in connection with making parts for a four-wheel drive refuge vehicle that Respondent manufactured. His rate of pay was $5 an hour, a figure substantially higher than the normal starting rate for fabricating employees of $3.80 an hour.[9] Custer testified that, at the time he was hired, Supervisor Junker informed him that if work slowed on the lathe he would be transferred to operate the less sophisticated machines at a reduction in pay. Tongish, however, testified that Respondent had never transferred an employee to a lesser job classification at reduced wages.

On April 10, Junker informed Custer that he would be laid off on the following day because work orders for the refuge vehicles had stopped due to the tight money situation. At the time of his April 11 layoff, approximately 1 month's back orders for refuge vehicle parts remained unfinished. Custer testified that these same orders were awaiting him on his recall in July.

6. Respondent's economic defense

With the exception of the four-wheel drive refuge vehicle, Respondent, for the most part, operates on a "job shop" basis maintaining a minimum inventory and manufacturing its products as orders are received. The refuge vehicle, an approximately $40,000 item, was being built during the first half of 1980 without any orders for their sale.[10]

According to the uncontroverted and credible testimony of Tongish, between mid-February and the beginning of March, Respondent experienced a sharp decline in business. From the beginning of March through mid-June, no new employees were hired and Respondent's payroll was reduced by the discharge of four individuals, Bennett, a janitor, a purchasing agent, and Supervisor Junker; the temporary layoff of Custer; and the voluntary quitting of six production and maintenance employees. None of these employees were replaced. Additionally, during this period of time, Respondent ceased its prior common practice of employing temporary Manpower assistance.[11]

[7] The "marval" saw was used in the manufacture of nearly all Respondent's equipment and was to be run for a full 8 hours a day.

[8] The term "excused absences" as used by Respondent at that time referred to any absence of which the supervisor had notice.

[9] While the starting rate for machine operators was $3.80 an hour, the experienced operators could earn as much as $4.40 an hour.

[10] Tongish testified that no refuge vehicle had been sold since at least October 1979. The record does not disclose how many of these vehicles were in inventory as of April.

[11] Counsel for Respondent, in his post-hearing brief, states that during this time plant hours were reduced from 9 to 8 hours a day and half days on Saturdays were eliminated. I am unable to find any reference to such changes in the record.

B. *Analysis and Conclusions*

1. The alleged 8(a)(1) violations

Supervisor Junker's undenied statements, threats, and questions directed to certain employees in the fabrication department on several occasions during April, as set forth in detail above, are clearly the type which the Board has routinely found in similar situations to unlawfully interfere with, restrain, and coerce employees in the exercise of their Section 7 rights. Respondent's counsel, in his post-hearing brief, in essence, argues that Junker's interrogation of employees and threats that the plant would close if the employees successfully organized, as well as his statement that Respondent was "cracking down" on absenteeism because of the advent of the Union, do not amount to independent 8(a)(1) violations since there was no showing that such conduct had a coercive effect on the employees. Clearly, the subjective effect of conduct on employees is not a proper consideration in determining whether such conduct on the part of Respondent constitutes a violation of Section 8(a)(1) of the Act.

The question then becomes whether Plant Manager Tongish's notice to employees posted on Respondent's bulletin board constituted an effective disavowal of Junker's conduct as to obviate the need for additional remedial action by Respondent.

In *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), the Board, in finding the employer's purported disavowal ineffective, restated the applicaple standards to be applied in such cases:

> It is settled that under certain circumstances an employee [sic] may relieve himself of liability for unlawful conduct by repudiating the conduct. To be effective, however, such repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Douglas Division, The Scott & Fetzer Company*, 228 NLRB 1016 (1977), and cases cited therein at 1024. Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. *Pope Maintenance Corporation*, 228 NLRB 326, 340 (1977). And, finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. See *Fashion Fair, Inc., et al.*, 159 NLRB 1435, 1444 (1966); *Harrah's Club*, 150 NLRB 1702, 1717 (1965).

Although Respondent did not post its notice until 5 weeks after the first threat, it does not appear that Respondent had specific notice of the alleged transgressions of its agent, Junker, until on or about May 5, when the Board agent conducting the investigation met with officials of Respondent and its attorney for the purpose of taking evidence. In this regard, I note that neither the original charge filed on April 14 nor the first amended charge filed on May 1 and served on Respondent May 5 specifically alleges as violative any conduct other than the unlawful discharges of employees Bennett and Custer.

With the exception of naming Junker as the supervisor who "may have acted in an improper manner," Respondent's notice specifically, as well as in statutory language, assures its employees that it will not engage in the type of conduct of which it had been accused or engage in any other types of unlawful conduct. The notice goes on to clearly and correctly state in the affirmative the rights its employees are guaranteed by Section 7 of the Act.

The notice was posted on the company bulletin board and apparently remained posted for some indefinite period of time. While the location of the bulletin board and the exact length of time for posting was not clarified on the record, it appears abundantly clear that the employees working under Junker's supervision, as well as all other production employees, had an adequate opportunity to read the notice if they so chose.

In these circumstances and in view of my findings and conclusions that Respondent did not in any other manner violate the Act, I am persuaded that Respondent's May 6 notice to employees effectively disavowed Junker's unlawful statements and obviates the need for additional remedial action. *Kawasaki Motors Corporation USA*, 231 NLRB 1151 (1977).

2. The discharge of Bill Bennett and the layoff of Gary Custer

While it is admitted that Respondent acquired a general knowledge of its employees' union activities almost immediately following the union meeting of March 26, I am not persuaded that the evidence establishes that Respondent knew of Bennett's and Custer's leading roles in the organizing effort until after the decisions to discharge and lay off Bennett and Custer, respectively, had been made by Plant Manager Tongish. In this regard, I do not view Moon's testimony that on one occasion he observed a supervisor from another department observing Bennett and Custer while they were soliciting the signature of an unidentified employee as sufficient evidence of specific knowledge on the part of Respondent. Further, it does not appear that Respondent would have reason to believe that either Bennett or Custer was any more active or responsible for the union campaign than any of the other employees who wore or prominently displayed union paraphernalia or otherwise clearly identified themselves as advocating the Union.

Likewise, I am not persuaded that the General Counsel has established that Plant Manager Tongish, the individual responsible for the actions taken against Bennett and Custer, harbored any union animus. Tongish impressed me as an honest and entirely reliable witness and I therefore credit his testimony that he was, until early May, unaware of Junker's unlawful conduct.

Even assuming that Respondent's plant manager both harbored union animus and knew for certain that Bennett and Custer were the two leading union adherents, the General Counsel has not made out a *prima facie* showing sufficient to support the inference that the protected conduct was a motivating factor in Respondent's decisions.

Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980).

With respect to Bennett, in mid-January he was informed that if he continued to waste time wandering about the plant he would be subject to discharge. Just a month later, Respondent was forced to transfer him to the "marval" saw in an effort to insure that he would not continue wandering away from his work station. At that time, Bennett's immediate supervisor, Junker, informed him that this was his last opportunity. In mid-March, still prior to any union activity, Bennett asked Junker for a raise which was denied on the grounds that Bennett's work was not good enough.

Against this background, Bennett sought and was given permission to take an hour off from work to repair his car early in the week of March 31. However, Junker informed him that any further absences would result in his termination. Two days later, he was absent for part of the day and it was at this point that Tongish decided to terminate Bennett's services. Based on this scenario alone, it is abundantly clear that the General Counsel has not met her burden with regard to Bennett.

The General Counsel, in her post-hearing brief, does not directly attack Respondent's evidence that commencing in late February Respondent experienced a sharp decline in sales, and that over the next several months Respondent made significant cuts in its payroll. The General Counsel argues that since Custer had the skill to operate all of the fabrication equipment Respondent should have retained Custer and merely cut his wages as Junker had promised him in January. Notwithstanding Junker's promise, Tongish credibly testified that Custer was specifically hired to perform the sophisticated work on the lathe in connection with Respondent's manufacture of the four-wheel drive refuge vehicles and that when that work was suspended Custer was simply laid off since Respondent had a policy against transferring employees to lower paying jobs. The evidence establishes that Respondent's decision in this regard was based on legitimate business considerations and Custer's union activities were not a "motivating factor" in Respondent's decision-making. Even if a contrary conclusion were to be reached, the evidence of Respondent's economic plight during this portion of 1980 adequately demonstrates that the same action would have taken place even in the absence of the protected conduct. *Wright Line, supra.*

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. While Respondent violated Section 8(a)(1) of the Act as alleged in the complaint, no remedial order is required.
4. Respondent did not violate Section 8(a)(3) and (1) of the Act by discharging employee Bill Bennett on April 4, 1980.
5. Respondent did not violate Section 8(a)(3) and (1) of the Act by laying off employee Gary Custer on April 11, 1980.

Upon the foregoing findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[12]

The complaint is dismissed in its entirety.

[12] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.